Supreme Court, U.S.
FILED
SEP 29 1995
CLERK

No. 95-451

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT L. SCHULZ, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and SALVATORE GRENCI,

Petitioners,

–v.–

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, MAJORITY LEADER OF THE SENATE, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; VINCENT TESE, INDIVIDUALLY AND AS COMMISSIONER OF THE ECONOMIC DEVELOPMENT DEPARTMENT, NEW YORK DEMOCRATIC STATE COMMITTEE, FRIENDS OF MARIO M. CUOMO COMMITTEE, INC., THE NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBEL, AS COMMISSIONER OF EDUCATION; THE COMMACK BOARD OF EDUCATION,

Respondents.

On Petition For A Writ of Certiorari
To The Court of Appeals, State of New York

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD C. CAHN, ESQ.
Counsel of Record

CAHN WISHOD & LAMB, LLP
Attorneys for Respondent Commack Union Free School District
534 Broadhollow Road—C.S. 9034
Melville, New York 11747-9034
(516) 694-2300

Virgil Mountain, Inc. (212) 779-4046 (L3242)

QUESTIONS PRESENTED

1. Were the Petitioners' claims under the New York State Constitution that Respondent Commack Union Free School District used public funds for private purposes, sufficient to raise a substantial federal question so as to confer jurisdiction upon this Court?

2. Since the Petitioners did not allege any actual appropriation of their individual property by the action they described, or even an indirect invasion of their specific property rights through regulation of the use thereof, did they validly allege any violation of the due process or takings clause of the Federal Constitution?

3. Since the Petitioners failed to raise in the New York Courts any question with regard to the constitutionality under the Guarantee Clause of the state statute that conferred exclusive jurisdiction in the first instance upon the Commissioner of Education, of school district election matters, was that claim preserved for review in this Court? If the claim was preserved, is it justiciable?

4. Do the Petitioners Schulz and Grenci possess standing to raise the claims presented in the Petition?

TABLE OF CONTENTS

Page

Table of Authorities iii

Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

Reasons for Denying the Writ 6

Point I:

To the extent the Petition is based upon Guarantee Clause claims, this Court lacks jurisdiction to entertain it because that federal question was not raised below 6

Point II:

Even if the Guarantee Clause claim had been raised below, there is no justiciable claim based upon New York's having conferred exclusive jurisdiction in the first instance upon its Commissioner of Education, instead of its courts, to decide disputes arising out of school district elections, particularly since New York permits judicial review of the Commissioner's determinations in such cases 7

TABLE OF CONTENTS

Page

Point III:

The Petitioners' claims, purportedly under the Fifth and Fourteenth Amendments, that they were deprived of their property, including the fruits of their labor, without due process, by a school district's dissemination at taxpayer expense of literature that allegedly exhorted the voters to approve a bond referendum, were properly dismissed by the state courts 9

A. Petitioners' vague use of the generic term "due process" in their state court pleadings was insufficient to raise a *bona fide* federal question..... 9

B. Petitioners' Fifth and Fourteenth Amendment claims were properly rejected..... 11

Point IV:

Petitioners Schulz and Grenci lack standing..... 12

TABLE OF CONTENTS

Page

Point V:

The Petition should be denied because Petitioner Schulz is unauthorized to appear herein either as an attorney or *pro se* 12

Conclusion 13

TABLE OF AUTHORITIES

Page

Cases Cited:

ASARCO Inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037 (1989) 11

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 706 (1962) 7

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948 (1987) 6

Bowe v. Scott, 233 U.S. 658, 664-65, 34 S.Ct. 769 (1914) 10

Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59, 98 S.Ct. 2620 (1978) 11

TABLE OF AUTHORITIES

Page

Cases Cited:

Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 2399-2401 (1991) 7

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) 11

New York v. United States, 112 S.Ct. 2408, 2432-2433 (1992) 7, 8

New York Central and H.R. Co. v. New York, 186 U.S. 269, 273, 22 S.Ct. 916 (1902) 9

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67-68, 49 S.Ct. 61 (1928) 10

Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla., 113 S.Ct. 2297 (1993) 11

Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447 (1995) 7

R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538 (1992) 8

Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491 (1991) 8

U.S. v. Richardson, 418 U.S. 166, 94 S.Ct. 2940 (1974) 12

TABLE OF AUTHORITIES

Page

Cases Cited:

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405 (1973) 12

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752 (1982) 11

Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993) 8

New York Constitutional Provisions:

Article VI, Section 7(a) 3

Article VIII, Section 1 ..... 2, 3

Federal Constitutional Provisions:

Article IV, Section 4 ..... 3, 6

Due Process Clause, Fifth and Fourteenth Amendments ..... *passim*

Statutes:

28 U.S.C. § 1257(a) 2

N. Y. Education Law § 2037 ..... 2, 3, 4, 8

No. 95-451

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT L. SCHULZ, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and SALVATORE GRENCI,

Petitioners,

-v.-

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, MAJORITY LEADER OF THE SENATE, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; VINCENT TESE, INDIVIDUALLY AND AS COMMISSIONER OF THE ECONOMIC DEVELOPMENT DEPARTMENT, NEW YORK DEMOCRATIC STATE COMMITTEE, FRIENDS OF MARIO M. CUOMO COMMITTEE, INC., THE NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBEL, AS COMMISSIONER OF EDUCATION; THE COMMACK BOARD OF EDUCATION,

Respondents.

On Petition for A Writ of Certiorari To The Court of Appeals, State of New York

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

With respect to Petitioners' Guarantee Clause claim, the jurisdiction of this Court is *not* properly invoked because that question was not raised in the state courts, and in any event, that claim is nonjusticiable.

With respect to Petitioners' claims under the Due Process clauses of the Fifth and Fourteenth Amendments, the jurisdiction of the Court is purportedly invoked pursuant to 28 U.S.C. § 1257(a). However, Respondent believes that the Petitioners' federal due process claims were inadequately pleaded, and that the Court lacks jurisdiction over those claims as well.

STATUTES INVOLVED

Petitioners principally claimed that the Respondent Commack Union Free School District ("the School District") violated Article VIII, Section 1 of the New York Constitution by using public funds to prepare and distribute partisan literature in connection with an impending bond referendum. They also claimed that the School District's alleged actions deprived them of their property, "including the fruits of their labor," without due process. The New York Court of Appeals assumed that Petitioners were attempting to invoke due process claims under the Fifth and Fourteenth Amendments to the United States Constitution, but rejected those claims. (Pet. for Cert. at A-6.)

Petitioners claimed for the first time on their intermediate state appeal that New York Education Law § 2037, which deprives the New York courts of

jurisdiction in the first instance over school election disputes, is unconstitutional as applied to their claim, because it deprives the court system of original jurisdiction in law and equity, contrary to Article VI Section 7(a) of the State Constitution. In their Petition for *certiorari*, Petitioners assert a claim never raised in the state courts: that violation of Articles VI and VIII of the New York Constitution also constitutes a violation of the Guarantee Clause found in Article IV, Section 4 of the United States Constitution.

STATEMENT OF THE CASE

Petitioners filed a combined action/special proceeding in the New York Supreme Court, asserting a variety of claims against a number of State and local officials, arising from various unrelated government actions. They claimed that the Commack Union Free School District (sued herein as "The Commack Board of Education") violated the New York State Constitution by disseminating, at taxpayers' expense, partisan literature designed to encourage support for a bonding referendum, which, it was asserted, violated Article VIII, Section 1 of the New York State Constitution, a provision that prohibits school districts from giving or lending money or property in aid of a private undertaking. The action was dismissed by Supreme Court, Albany County, on the grounds that New York Education Law § 2037 confers upon the State's Commissioner of Education exclusive original jurisdiction over school district election matters. (Pet. for Cert. at A-19.) The Appellate Division of the Supreme Court unanimously affirmed (Pet. for Cert.

at A-14), as did the New York Court of Appeals (Pet. for Cert. at A-1). This Petition for *Certiorari* followed.

In a separate cause of action in their initial pleading, Petitioners claimed that the actions of the School District violated their fundamental rights "against a taking of their property . . . including the fruits of their labor, without due process." (Pet. for Cert. at 12.)

Petitioners attempted in the Appellate Division to challenge the constitutionality of Section 2037 as applied, but the Court noted that they had failed to make that claim in the court of first instance; accordingly, their attempt to raise the question for the first time in the Appellate Division was rejected by that Court. (Pet. for Cert. at A-17.)[1]

Without having raised the question in any New York court, Petitioners now make the additional claim that the separation of powers principle embodied in the State Constitution (see n. 1, *supra),* is an essential part of New York's compliance with the Guarantee Clause of the Federal Constitution, so that New York's declining to allow its courts to assume original jurisdiction over constitutional questions arising in the school election context deprives Peti-

---

1 The rejected claim appeared to be that Section 2037 violated Article VI, Section 7(a) of the State Constitution, which confers original jurisdiction upon New York's Supreme Court in law and equity. (Pet. for Cert. at 12-13.) They claimed that the State Constitution requires the State Courts, as contrasted with the State Education Commissioner (who is an officer of the Executive Branch of State government), to decide constitutional questions in the first instance.

tioners of their federally protected right to a republican form of government. (Pet. for Cert. at 7, 18-19.)[2]

In their Petition, Petitioners fail to note that their alleged lack of recourse to the court system was definitively addressed by the Court of Appeals, which ruled that, contrary to Petitioners' contention, judicial review of a determination of the Commissioner of Education was available in a school election case:

> That plaintiffs' complaint regarding the school board's distribution of the allegedly tainted materials was couched in terms of a constitutional violation did not obviate the statutory mandate to originate the matter before the Commissioner of Education. A constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established. . . Moreover, merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief.

(Pet. for Cert. at A-5.)

The Court of Appeals treated Petitioners' federal due process claims as having been properly identified in the pleading (a conclusion with which Respond-

---

2 New York's Court of Appeals did not reach or decide any claims based upon the federal constitution's Guarantee Clause, because no such claims were asserted in the state court proceedings.

ent disagrees), but held that such claims were insufficiently pleaded because "plaintiffs had not alleged any actual appropriation of their individual property by the governmental action they describe, or even an indirect invasion of their specific property rights through regulation of the use thereof." (Pet. for Cert. at A-6.)

Petitioners Robert L. Schulz and Salvatore J. Grenci are non-residents of the School District, and hence lack standing.

REASONS FOR DENYING THE WRIT

POINT I.

TO THE EXTENT THE PETITION IS BASED UPON A GUARANTEE CLAUSE CLAIM, THIS COURT LACKS JURISDICTION TO ENTERTAIN IT BECAUSE THAT CLAIM WAS NOT RAISED BELOW.

The Petitioners failed in the State Court proceedings to make any claim based upon the Guarantee Clause. (U.S. Const. Art. IV, Section 4.) The state constitutional separation of powers claim, upon which the federal Guarantee Clause claim is now based, was not raised in the court of original instance, and the Appellate Division, relying upon established New York precedent, properly declined to rule upon it. (Pet. for Cert. at A-17.) Therefore, Petitioners' Guarantee Clause claim was not adequately presented to the State Courts, and this Court lacks jurisdiction to decide it. *Board of Directors of Rotary International*

v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948 (1987).

POINT II.

EVEN IF THE GUARANTEE CLAUSE CLAIM HAD BEEN RAISED BELOW, THERE IS NO JUSTICIABLE CLAIM BASED UPON NEW YORK'S HAVING CONFERRED EXCLUSIVE JURISDICTION IN THE FIRST INSTANCE UPON ITS COMMISSIONER OF EDUCATION, INSTEAD OF ITS COURTS, TO DECIDE DISPUTES ARISING OUT OF SCHOOL DISTRICT ELECTIONS, PARTICULARLY SINCE NEW YORK PERMITS JUDICIAL REVIEW OF THE COMMISSIONER'S DETERMINATIONS IN SUCH CASES.

Even if timely pleaded, Petitioners' Guarantee Clause claim is not justiciable under traditional precedent. *See, New York v. United States*, 112 S.Ct. 2408, 2432-2433 (1992); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 706 (1962). To the extent the Guarantee Clause is recognized as the basis of enforceable rights, it may at best confer a right upon a state government or its subdivisions to sue to enforce the provisions of a federal statute. *New York v. United States, supra*, 112 S.Ct. at 2433; *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 2399-2401 (1991).

Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447 (1995), relied upon by Petitioners (Pet. for Cert. at 16), has no application, as it dealt with a federal separation of powers issue, not a state government issue.

There is no problem of federal constitutional dimension that has been delineated in the Petition, or that we can discern, with New York's statutory scheme for the review of school district elections. Despite the language of Education Law § 2037, judicial review of the decisions of the Commissioner of Education in school election cases has long been available, as reaffirmed by the Court of Appeals in this case. (Pet. for Cert. at A-4.)

Since this Court is bound by the interpretation and construction of a state constitution or statute that is given by the state's highest court (*Wisconsin v. Mitchell*, 113 S.Ct. 2194 [1993]; *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538 [1992]; *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 [1991]), the Court is not free to construe § 2037 as precluding access to the New York Courts by a party aggrieved by actions of a board of education pertaining to a school district election. There is thus no danger that New York will lose "its ability to set [its] legislative agendas," or that New York's officials will not "remain accountable to the electorate." *New York v. United States, supra.*

Thus, even if timely presented to the state courts, the Guarantee Clause claim cannot stand.

POINT III.

THE PETITIONERS' CLAIMS, PURPORTEDLY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THAT THEY WERE DEPRIVED OF THEIR PROPERTY, INCLUDING THE FRUITS OF THEIR LABOR, WITHOUT DUE PROCESS, BY A SCHOOL DISTRICT'S DISSEMINATION AT TAXPAYER EXPENSE OF LITERATURE THAT ALLEGEDLY EXHORTED THE VOTERS TO APPROVE A BOND REFERENDUM, WERE PROPERLY DISMISSED BY THE STATE COURTS.

The Court of Appeals treated Petitioners' general due process claims as federally based (Pet. for Cert. at A-6), but whatever the merits of that holding with respect to the other governmental defendants, Fifth and Fourteenth Amendment claims were not adequately pleaded against the School District.

A. Petitioners' Vague Use of the Generic Term "Due Process" in Their State Court Pleadings was Insufficient to Raise a *Bona Fide* Federal Question.

It is well settled that in order for this Court to have jurisdiction to review a determination of a State's highest Court, "some provision of the Federal, as distinguished from the State, Constitution [must be] relied upon, and such provision must be set forth." *New York Central and H.R. Co. v. New York*, 186 U.S. 269, 273, 22 S.Ct. 916 (1902). Thus, if a petitioner claims that a State statute is "unconstitutional" or that it violates "due process," it will be assumed that reference is being made to the State

Constitution and rights thereunder rather than to the Federal Constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68, 49 S.Ct. 61 (1928). This is especially true where, as here, the applicable State Constitution contains a due process clause. *Bowe v. Scott*, 233 U.S. 658, 664-65, 34 S.Ct. 769 (1914).

In the present case, Petitioners' entire federal constitutional claim (after the text of the Fifth Amendment is set out), is set forth in paragraph 195 of their initial pleading:

> It is a violation of plaintiffs' fundamental right as expressed in said Fifth Amendment for the Executive or Legislative branch of the State of New York, a county subdivision of the State of New York, or a school district subdivision of the State of New York to take money from plaintiffs-voters-citizens-residents-taxpayers in violation of the provisions of the State Constitution and its laws.

Petitioners did not adequately identify their claim against the School District as falling within the ambit of the federal, as contrasted with the state constitution. A legal conclusion without supporting reasoning is not sufficient to present an issue for careful consideration by the state courts, which must precede its consideration by this Court. However, even if such a claim was adequately identified, it was properly rejected by the state courts.

B. Petitioners' Fifth and Fourteenth Amendment Claims were Properly Rejected.

We have found no support for the proposition that a violation of a state constitutional provision against expenditure of public funds in aid of a private undertaking is automatically also a federal due process violation. And, as the court of original instance stated, the absence of a due process violation is quite apparent:

> Plaintiffs have had access to the court and an adequate opportunity to challenge on the merits, the actions of the defendants alleged to be in violation of Articles VII and VIII of the New York State Constitution. The requisites of due process have been satisfied.

(Pet. for Cert. at A-29–A-30.)

It is well established that federal due process claims must be based upon a specific infringement of the plaintiff's personal property rights. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). The principle of standing does not extend to a general challenge to the expenditure of tax funds. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 113 S.Ct. 2297 (1993); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037 (1989); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752 (1982); *Duke Power Company v. Carolina Environ-*

mental Study Group, 438 U.S. 59, 98 S.Ct. 2620 (1978); *U.S. v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940 (1974); *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405 (1973).

It clearly follows that an individual taxpayer cannot properly claim an infringement of his due process rights under Articles 5 and 14 of the Federal Constitution when the only specific injury sustained by him is a possible increase in taxes, and when redress for that injury is adequately provided by New York.

POINT IV.

PETITIONERS SCHULZ AND GRENCI LACK STANDING.

Petitioner Robert L. Schulz resides in Queensbury, New York; Petitioner Salvatore Grenci resides in West Islip, New York. Neither lives in, or is a taxpayer of the Commack Union Free School District. Thus, neither has standing to bring this Petition.

POINT V.

THE PETITION SHOULD BE DENIED BECAUSE PETITIONER SCHULZ IS UNAUTHORIZED TO APPEAR HEREIN EITHER AS AN ATTORNEY OR *PRO SE*.

Petitioner Schulz is not a resident or taxpayer of Commack and thus concededly lacks standing as a petitioner herein *(See*, Point IV, *supra)*. Since Schulz has no standing as a party, his signing the Petition can only be interpreted as his attempt to act as

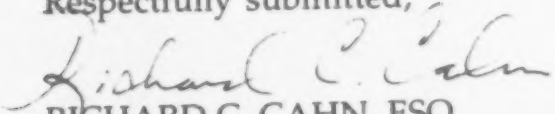
attorney-at-law for the two *pro se* plaintiffs who do reside in the district. His actions in thus "representing" the other named Petitioners are indistinguishable from the actions of an attorney at law, and we believe that he is in violation of the State criminal laws and the rules of the New York Courts relating to the practice of law by non-lawyers, and that by filing and signing the instant Petition for *Certiorari* he is also violating Rules 9.1 and 12.1 of this Court, which require appearance by counsel admitted to the Bar of this Court. The unauthorized presentation of the Petition by Schulz provides an additional reason for its denial.

CONCLUSION

Since the federal claims were not adequately presented to the New York courts, and in any event raise no issue that require resolution by this Court, the Petition for *Certiorari* should be denied.

Dated: Melville, New York
September 29, 1995

Respectfully submitted,



RICHARD C. CAHN, ESQ.
Counsel of Record

CAHN WISHOD & LAMB, LLP
Attorneys for Respondent Commack Union Free School District
534 Broadhollow Road—C.S. 9034
Melville, New York 11747-9034
(516) 694-2300